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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 167

BOYCE MOTOR LINES, INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JULY 2, 1951.

CERTIORARI GRANTED OCTOBER 15, 1951.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 26, 1951.

8001

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Docket Entries

Cr. 330-49

10-5-49. Indictment for unlawful transportation of a dangerous article, carbon bisulphide, in interstate commerce filed 10-4-49.

10-5-49. Notice of Allocation filed. (Newark.)

10-11-49. Notice of Appearance filed.

11-7-49. Motion to dismiss indictment and acknowledgment of service filed 11-4-49.

11-15-49. Notice of motion to dismiss indictment returnable Dec. 2, 1949 and acknowledgment of service filed 11-14-49.

12-5-49. Hearing on motion to dismiss indictment. Decision reserved. (Smith.)

6-16-50. Opinion filed 6-15-50. (Smith.) (Counts 1, 3 and 5 dismissed.)

11-22-50. Order dismissing counts 1, 3 and 5 filed 11-21-50. (Smith.)

11-22-50. Notice of Appeal filed.

11-22-50. Copies of notice of appeal mailed to Joseph C. Glavin and Clerk, U. S. C. A.

[fol. 2] In United States District Court, District of New Jersey

Indictment

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

Count One

That on or about the 13th day of May, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a com-

mon carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 80 drums of carbon bisulphide, an inflammable liquid, having a total gross weight of 48,536 pounds, did unlawfully and knowingly cause Edmund Tyndall to drive and operate said motor vehicle containing said shipment of carbon bisulphide into the Holland Tunnel, a congested thoroughfare at Jersey City, aforesaid, in the course of shipment in Interstate Commerce aforesaid, without said motor vehicle bearing any marks or signs on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid, in which said Holland Tunnel, said 80 drums of carbon bisulphide flamed and exploded;

[fol. 3]

The Grand Jury further charges:

That there were other available and more practicable routes for the transportation of said shipment, and that the defendant well knew that the transportation of the shipment of carbon bisulphide, as aforesaid, into the said Holland Tunnel was in violation of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle; as a result of which violation, bodily injuries were caused to approximately 60 persons. (Title 18 U. S. C. Sec. 835; 49 C. F. R. Cum. Supp., Sec. 197.1(b)).

Count Two

The Grand Jury further charges:

That on or about the 13th day of May, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon

bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute [fol. 4] to Brooklyn, New York, a certain motor vehicle containing a shipment of 2500 pounds and more of carbon bisulphide, an inflammable liquid, to wit: 48,536 pounds of carbon bisulphide, did unlawfully and knowingly operate and cause to be operated said motor vehicle containing said shipment of carbon bisulphide, on and over the public roadways at Jersey City, New Jersey, enroute to Brooklyn, New York, in the course of shipment in interstate commerce, as aforesaid, without said motor vehicle bearing any marks, signs or placards on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid in violation of the provisions of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicles. (Title 18 U. S. C. Sec. 835; 49 C. F. R., 1947 Supp. 71-85 Part 7, 823(a), Page 7025.)

Count Three

The Grand Jury further charges:

That on or about the 7th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade [fol. 5] Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 58 drums of carbon bisulphide, an inflammable liquid, having a total gross weight of 36,687 pounds, did unlawfully and knowingly cause Michael Amato

to drive and operate said motor vehicle containing said shipment of carbon bisulphide into the Holland Tunnel, a congested thoroughfare at Jersey City, aforesaid, in the course of shipment in interstate commerce aforesaid, without said motor vehicle bearing any marks or signs on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid.

The Grand Jury further charges:

That there were other available and more practicable routes for the transportation of said shipment, and that the defendant well knew that the transportation of the shipment of carbon bisulphide, as aforesaid, into the said Holland Tunnel was in violation of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. Cum. Supp., Section 197.1(b).)

Count Four

The Grand Jury further charges:

That on or about the 7th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon [fol. 6] bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 2500 pounds and more of carbon bisulphide, an inflammable liquid, to wit, 58 drums of carbon bisulphide having a total gross weight of 36,687 pounds, did unlawfully and knowingly operate and cause to be operated said motor vehicle containing said shipment of carbon bisulphide, on and over the public roadways at Jersey City, New Jersey, enroute to Brooklyn, New York, in the course of shipment in interstate commerce, as aforesaid, without

said motor vehicle bearing any marks, signs or placards on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid in violation of the provisions of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. 1947 Supp. 71-85 Part 7, 823(a), Page 7025.)

Count Five

The Grand Jury further charges:

That on or about the 8th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a com- [fol. 7] mon carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 22 drums of carbon bisulphide, an inflammable liquid, having a total gross weight of 13,904 pounds, did unlawfully and knowingly cause George Jester to drive and operate said motor vehicle containing said shipment of carbon bisulphide into the Holland Tunnel, a congested thoroughfare at Jersey City, aforesaid, in the course of shipment in interstate commerce aforesaid, without said motor vehicle bearing any marks or signs on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid.

The Grand Jury further charges:

That there were other available and more practicable routes for the transportation of said shipment, and that the defendant well knew that the transportation of the shipment of carbon bisulphide, as aforesaid, into the said Holland Tunnel was in violation of the regulations promulgated and published by the Interstate Commerce Commis-

sion relating to the transportation of explosives and other dangerous articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. Cum Supp. Section 197.1(b).)

[fol. 8] Count Six

The Grand Jury further charges:

That on or about the 8th day of April, 1949, at Jersey City, in the District of New Jersey, Boyce Motor Lines, Inc., a corporation, hereinafter referred to as defendant, a common carrier by motor vehicle, engaged in transportation in interstate commerce of a dangerous article, to wit, carbon bisulphide, and subject to the regulations of the Interstate Commerce Commission relating to the transportation of explosives and other dangerous articles by motor vehicle, through its authorized agents and employees, operated and caused to be operated in interstate commerce from Cascade Mills, New York, through the State of New Jersey, enroute to Brooklyn, New York, a certain motor vehicle containing a shipment of 2500 pounds and more of carbon bisulphide, an inflammable liquid, to wit, 22 drums of carbon bisulphide, having a total gross weight of 13,904 pounds, did unlawfully and knowingly operate and cause to be operated said motor vehicle containing said shipment of carbon bisulphide, on and over the public roadways at Jersey City, New Jersey, enroute to Brooklyn, New York, in the course of shipment in interstate commerce, as aforesaid, without said motor vehicle bearing any marks, signs or placards on each side and rear thereof indicating that said motor vehicle was transporting a dangerous and inflammable liquid in violation of the provisions of the regulations promulgated and published by the Interstate Commerce Commission relating to the transportation of explosives and other dangerous [fol. 9] articles by motor vehicle. (Title 18 U. S. C. Sec. 835; 49 C. F. R. 1947 Supp. 71-85 Part 7, 823(a), Page 7025.)

(S.) Alfred E. Modarelli, United States Attorney.

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

OPINION

SMITH, District Judge:

The indictment in this case contains six counts, each of which charges the defendant with a violation of certain of the regulations promulgated by the Interstate Commerce Commission pursuant to Section 835 of Title 18, United States Code. The defendant moves to dismiss the indictment and urges in support of the motion several grounds herein discussed.

Statute

"The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common carrier engaged in interstate or foreign commerce by land or water.

[fol. 10] "The commission, of its own motion, or upon application made by any interested party, may make changes or modifications in such regulations, made desirable by new information or altered conditions.

"Such regulations shall be in accord with the best-known practicable means for securing safety in transit, covering the packing, marking, loading, handling while in transit, and the precautions necessary to determine whether the material when offered is in proper condition to transport.

. . . . . .

"Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (18 U. S. C. 835.)

Counts One, Three and Five

These counts were apparently intended to charge violations of the following regulation: "Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." (Emphasis by the Court.) 49 C. F. R. 238, 1949 Ed., Section 197.1(b).

The defendant contends that the quoted regulation is invalid because of its failure to define an "ascertainable [fol. 11] standard of guilt." We agree with this contention. The regulation clearly imposes upon the "drivers of motor vehicles" the duty to avoid "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings," only "so far as practicable, and, where feasible." The duty is not absolute but is limited; it must be discharged only as far as practicable and where feasible. It is our opinion that these very terms are so vague and indefinite as to make the standard of guilt conjectural. Whether or not a particular course of conduct is practicable may depend, as it frequently does, on individual judgment; that which seems practicable to one may not seem practicable to another.

It was held by the Supreme Court in the case of Connally v. General Construction Co., 269 U. S. 385, at page 391: "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." It is further stated in the opinion of the Court, at page 393: "A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it

is lawful for him to pursue." See also United States v. Cohen Grocery Co., 255 U. S. 81; Lanzetta v. New Jersey, 306 U. S. 451; Winters v. New York, 333 U. S. 507; but see United States v. Alford, 274 U. S. 264; Sproles v. Binford, [fol. 12] 286 U. S. 374; United States v. Ragen, 314 U. S. 513; United States v. Sullivan, 332 U. S. 689. It is our opinion that the four cases in the latter group are distinguishable but we see no reason to discuss the distinctions.

The views expressed by the Supreme Court in the case of Kraus & Bros. v. United States, 327 U. S. 614, are apposite. The Court, passing on the validity of a regulation promulgated by the Price Administrator pursuant to the Emergency Price Control Act, stated at page 621: "This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. . . . The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action." These principles are equally applicable to regulations promulgated by the Commission.

We are fully aware that the disaster which led to the present prosecution emphasized the need for adequate regulations, but it is not within our power to make them. It was further stated in the case of Kraus & Bros. v. United States, at page 622: "A prosecutor in framing an indict-[fol. 13] ment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add

certainty or definiteness to otherwise vague language. Prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability." It should be apparent that we cannot, under the pretense of interpretation, give certainty to the regulation so as to make it meet the obvious need.

It should be further observed that the offense defined in the regulation is malum prohibitum, and intent is not an element of the offense as defined. It is for this further reason that the standard of guilt should be prescribed with a reasonable degree of certainty so that the ordinary person can intelligently determine what conduct is within the prohibition of the regulation.

There are additional grounds urged by the defendant in support of the motion. It seems unnecessary to consider these grounds, but we deem it advisable to discuss them. A discussion may be of some assistance and guidance in the future prosecution of cases of this character.

The defendant further contends that these counts fail to charge an offense. This contention is based solely upon the argument that the particular regulation is directed only to the "drivers of motor vehicles" engaged in the transportation of explosives and other materials. The argument is sound but it does not follow therefrom that others, for example the employers of drivers, may not be prosecuted for violations of the regulation. The regulation is, by its ex- [fol. 14] press language, applicable to the "drivers of motor vehicles," but others who aid, abet, counsel, command, induce or procure the commission of the offense therein defined, are principals and punishable as such. 18 U. S. C. 2(a); see Coffin v. United States, 162 U. S. 664; United States v. Johnson, 319 U. S. 503; United States v. Martinelli, 142 F. 2d 446. The statute, 18 U. S. C. 2(b), also provides: "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." This contention is therefore not sustainable.

The defendant urges as an additional ground that these counts of the indictment are ambiguous and duplicitous.

We agree that the language of these counts is ambiguous but we cannot agree that they are duplicitous. An indictment must charge an offense with a reasonable degree of certainty so that the accused may be informed as to the nature of the charge made against him. The purpose of this requirement is to enable the accused to prepare and make his defense and thereafter to plead the judgment as a bar to a subsequent prosecution for the same offense. These principles are so well established that we see no reason to cite cases in support of them.

These counts of the indictment fail to meet the basic requirements. It is suggested by the United States Attorney that some of the language is mere surplusage. We are inclined to concede that it probably is, but it is this surplus language that makes the counts of the indictment ambiguous. The surplusage will ordinarily not affect an indictment and may be disregarded, but where, as here, it creates an ambiguity, it should not be disregarded. We are no longer bound by the rigid rules of common law pleading but we have not abandoned the basic principles of good pleading. The present Rules of Criminal Procedure require nothing [fol. 15] more than "a plain, concise and definite written statement of the essential facts constituting the offense charged." Rule 7(c). There is no reason why this rule cannot be followed.

Second, Fourth and Sixth Counts

These counts charge violations of the following regulation: "Every motor vehicle transporting any quantity of dangerous explosives, class A, poison gas, class A, or radioactive material, poison class D requiring red radioactive materials label, and every motor vehicle transporting 2500 pounds or more of explosives, class B, inflammable liquids, corrosive liquids, compressed gas and tear gas, or 5000 pounds or more of two or more articles of these groups shall be marked or placarded on each side and rear with a placard or lettering in letters not less than three inches high on a contrasting background." There follows a brief description sufficient to identify the required placard, 49 C. F. R. 7025; 1947 Sup., Sec. 823(a).

The defendant moves to dismiss these counts on the ground that their language is vague, indefinite and ambig-

uous. This ground is without merit. The language of these counts is not entirely free of ambiguity but it is sufficiently plain and concise so as to meet the requirements hereinabove discussed. There can be no doubt as to the nature of the charges therein made against this defendant.

All Counts

The principal ground urged by the defendant in support of the motion is that there is inherent in the statute as unlawful delegation by Congress of legislative power, in [fol. 16] violation of the Constitution. This ground is founded upon the usual argument that the Act fails to prescribe adequate standards for the guidance of the Commission. It is our opinion that this ground and the argument advanced in support of it are without merit. Buttfield v. Stranahan, 192 U. S. 470; Sunshine Coal Co. v. Adkins, 310 U. S. 381; Yakus v. United States, 321 U. S. 414; American Power & Light Co. v. Securities & Exchange Commission, 141 F. 2d 606, 625, and the other cases therein cited. It is our opinion that the standards prescribed by the Act, considered in the light of its obvious purpose and the declaration of policy contained in the preamble of the Act of September 18, 1940, c. 722, Title 1, 54 Stat. 899, 49 U. S. C. A., preceding 1, satisfy the constitutional requirements and afford an adequate guide to the Commission.

The statement by the Supreme Court in the case of Sunshine Coal Co., supra, at page 398, would seem to be particularly applicable here. It was therein stated: "In the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist upon a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." It cannot be denied that the Interstate Commerce Commission is a competent and experienced administrative agency.

[fol. 17] Conclusion

Counts one, three and five will be dismissed for the reasons herein stated. The motion addressed to counts two, four and six will be denied for the reasons herein stated. The United States Attorney will prepare and submit to the Court a proper order.

In United States District Court, District of New Jersey

Order—November 21, 1950

The defendant Boyce Motor Lines, Inc., having made a motion for the dismissal of the above entitled indictment, and the motion having been argued before the Court by Joseph C. Glavin, Esq., for the motion on behalf of the defendant, and Charles J. Tyne, Assistant United States Attorney in opposition thereto; the Court having considered the arguments and briefs submitted by respective counsel, and the Court having filed an Opinion on the 15th day of June, 1950, in which it was determined that Counts 1, 3 and 5 of the above entitled indictment should be dismissed, and that the motion should be denied as to counts 2, 4 and 6 for the reasons stated therein,

It is, on this 21st day of November, 1950, Ordered that Counts 1, 3 and 5 of the above entitled indictment be and the same hereby are dismissed, and that the defendant's motion to dismiss Counts 2, 4 and 6 of the indictment be and the same hereby is denied.

William F. Smith, United States District Judge.

[fol. 18] [Stamp:] Received Jun. 13, 1951. Office of the Clerk, Supreme Court, U. S.

[Stamp:] Received & Filed Jan. 9, 1951. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

APPLICATION BY THE PORT OF NEW YORK AUTHORITY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

[fol. 19] Please take notice that upon the annexed affidavit of Russell E. Watson, verified the 4th day of January, 1951, the undersigned will move this Court on a day for motions to be held at the United States Courthouse, in Philadelphia, Pennsylvania, on the 15th day of January, 1951, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting leave to The Port of New York Authority to file a brief as *amicus curiae* in this case.

Russell E. Watson, Attorney for The Port of New York Authority, 390 George Street, New Brunswick 1, New Jersey.

[fol. 20] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Russell E. Watson, being duly sworn, deposes and says:

1. I am an Attorney-at-Law, duly admitted to practice in the United States Court of Appeals for the Third Circuit. I am an attorney for The Port of New York Authority and have been duly authorized by The Port of New York Authority to represent it in the above entitled proceedings.

2. Prior to this proceeding, applicant petitioned the parties to the case for consent to the filing of a brief as *amicus curiae*. While appellant, the United States of America, granted its consent, defendant-appellee refused.

3. The question involved in the appeal of this case is whether the regulation promulgated by the Interstate Com-
[fol. 21] merce Commission, 49 CFR 238, 1949 Ed., Section 197.1 (b), pursuant to Congressional authorization contained in Section 835, 18 United States Code, 62 Stat. 739, meets the constitutional requirement that a criminal statute or regulation afford an ascertainable standard of guilt.

4. The Port of New York Authority, a governmental agency created by Compact between the States of New York and New Jersey, operates bridges and tunnels which connect the two states and which are used by vehicles moving in interstate commerce between them.

5. The Port of New York Authority here seeks leave to file a brief as *amicus curiae* in support of the Government's position for the following reasons:

(a) The question of the validity of the regulation arises from the dismissal of counts of an indictment predicated upon the explosion on May 13, 1949 of the cargo of defendant's vehicle in the Holland Tunnel, a facility operated by The Port of New York Authority, which explosion resulted

in over one-half million dollars property damages, sixty persons injured and one person dead; and

(b) The regulation in question is designed to effectuate the Congressional intent that there be a safe transportation of dangerous cargo in interstate commerce. It is of vital concern to The Port of New York Authority that the validity [fol. 22] of the regulation be sustained, for as operator of various tunnels and bridges which carry a continuous flow of vehicles throughout the day and night, The Port of New York Authority is deeply concerned that the users of its facilities shall be spared any bodily injuries such as those suffered in the holocaust of May 13, 1949, and that their property and its facilities be protected from damages comparable to or even greater than the damage suffered by the Holland Tunnel as a result of the explosion of the cargo of defendant's vehicle.

6. No previous application has been made for this relief.

Wherefore, I respectfully pray that an order be made and entered herein granting the within motion, and for such other and further relief as this Court may deem just and proper in the premises.

Russell E. Watson.

Sworn to before me this 4th day of January, 1951. Jack F. Burdi, Notary Public for the State of New York, Qualified in Kings County, No. 24-0492125. Certs. filed with Co. Clerks, Bronx, New York, Queens & Richmond and with City Register, New York, Bronx, Kings & Queens. Commission expires March 30, 1951.

[fol. 23] [Stamp:] Received & Filed Jan. 9, 1951. Ida O. Creskoff, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

10,368

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

NOTE OF ISSUE

[fol. 24] Motion for an Order granting leave to The Port of New York Authority to appear herein as *amicus curiae* and in such capacity to serve and file a brief *amicus curiae* with this Court in this case.

Motion returnable 10:30 A. M., January 15, 1951.

For the Motion—Russell E. Watson, Esq., Attorney for The Port of New York Authority, Office and Post Office Address: 390 George Street, New Brunswick, New Jersey.

Counsel for Appellant—Charles J. Tyne, Esq., Assistant United States Attorney, United States Post Office Building, Newark 1, New Jersey.

Counsel for Appellee—Joseph C. Glavin, Esq., 921 Bergen Avenue, Jersey City 6, New Jersey.

[fol. 25] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

10368

UNITED STATES OF AMERICA, Appellant,

against

BOYCE MOTOR LINES, INC., Appellee

ORDER

Present: Goodrich, Kalodner and Staley, Circuit Judges.

This cause came on to be heard on the motion of Russell E. Watson, Esq., A. Dudley Watson, Esq., of counsel, attorney for The Port of New York Authority, for an order

granting leave to The Port of New York Authority to serve upon the parties and to file a brief *amicus curiae* with this Court in this case, and after hearing counsel and due consideration, it is ordered, adjudged and decreed that The Port of New York Authority be granted leave to serve and file a brief *amicus curiae* in this case within five days from the date of this order.

Dated: January 15, 1951.

Herbert F. Goodrich, Judge of Court of Appeals, Third Circuit.

(Received & Filed Jan. 15, 1951. Ida O. Creskoff, Clerk.)

[fol. 26] [Endorsed:] In the United States Court of Appeals for the Third Circuit. United States of America, Appellant, against Boyce Motor Lines, Inc., Appellee. Order.

[fol. 27] [Stamp:] Received & Filed Feb. 2, 1951, Ida O. Creskoff, Clerk.

UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 10,368

UNITED STATES OF AMERICA, Appellant,

vs.

BOYCE MOTOR LINES, INC., Appellee

On Appeal &c. *Stipulation*

It is hereby stipulated and agreed by and between counsel for the respective parties as follows:

1. That the appellee requires additional time for the preparation and filing of its brief herein, because of the fact that more than five months elapsed between the filing of the opinion of the District Judge and the entry of the order dismissing Counts 1, 3 and 5 of the Indictment. Consequently the attorney for the appellee lost touch and familiarity with the cases and law involved and will of necessity be required to engage in extensive research in order to meet the questions raised in appellant's brief. In

addition, the Port of New York Authority obtained leave of this Court to file a brief as amicus curiae and in said brief made legal contentions different from those raised in appellant's brief, which must also be met in appellee's brief. Furthermore, counsel for appellee, in the interim between the filing of the opinion and the entry of the order on which this appeal was taken, had made important commitments and became engaged in extensive and time consuming litigation, all of which prevented them from devoting sufficient time, within the period allowed by the rules, to adequately and properly prepare appellee's brief. It is, therefore, impossible to file appellee's brief within time.

[fol. 28] 2. That the Court be respectfully requested to grant an order extending the time for the filing of appellee's brief to February 20, 1951. Said extension of time to include the filing of appellee's reply brief to the brief filed by the Port of New York Authority as amicus curiae, as well as to appellant's brief.

Dated: January 30, 1951.

Joseph C. Glavin, Attorney for Appellee, Boyce Motor Lines, Inc. Grover Cleveland Richman, Jr., Attorney for Appellant, United States of America.

Feb. 2, 1951. Approved. Kalodner, J.

[fol. 29] [Endorsed:] United States Court of Appeals for the Third Circuit, Docket No. 10,368. United States of America, Appellant, vs. Boyce Motor Lines, Inc., Appellee. On Appeal, &c. *Stipulation.* Joseph C. Glavin, Attorney for Appellee, Boyce Motor Lines, Inc., 921 Bergen Avenue, Jersey City, N. J.

[fol. 30] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

vs.

BOYCE MOTOR LINES, INC.

Upon consideration of the stipulation of counsel to extend time for filing appellee's brief in the above-entitled case to February 20, 1951,

It is Ordered that the stipulation be, and it is hereby approved.

Kalodner, Circuit Judge.

February 2, 1951.

(Received & Filed Feb. 2, 1951. Ida O. Creskoff, Clerk).

[fol. 31] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

v.

BOYCE MOTOR LINES, INC.

Appeal from the United States District Court for the District of New Jersey

Submitted March 6, 1951

Before Maris, McLaughlin and Hastie, Circuit Judges

OPINION OF THE COURT—Filed May 3, 1951

By MARIS, Circuit Judge:

This is an appeal by the United States from so much of an order of the District Court for the District of New Jersey as dismissed counts 1, 3 and 5 of an indictment against the defendant, Boyce Motor Lines, Inc. The three

counts charged the defendant with three separate violations of the provisions of § 197.1(b) of a regulation of the Interstate Commerce Commission governing the transportation of explosives and other dangerous articles by motor vehicle. 49 CFR (1949 Ed.) § 197.1(b). This regulation was promulgated by the Interstate Commerce Commission [1], pursuant to the authority conferred upon it by 18 U. S. C. § 835, which [fol. 32] section also makes the knowing violation of the regulation a criminal offense. Holding that § 197.1(b) of the regulation is so vague and indefinite as not to set forth an ascertainable standard of guilt the district court concluded that the section was invalid and accordingly dismissed the counts of the indictment which charged the violation of it. 90 F. Supp. 996.

§ 197.1(b) with which we are here concerned provides:

> "(b) *Avoidance of congested places.* Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings."

The pertinent provisions of 18 U. S. C. § 835 are as follows:

> "The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common

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[1] Filed May 14, 1943, effective June 15, 1943, 8 F. R. 6481, amended 9 F. R. 541.

carrier engaged in interstate or foreign commerce by land or water.

. . . .

"Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall [fol. 33] be fined not more than $10,000 or imprisoned not more than ten years, or both."

The district court held the regulation invalid because it concluded that the violation of it is malum prohibitum in which intent is not a factor and, that being so, the use of the phrases "so far as practicable" and "where feasible" are so vague and indefinite as to make conjectural the standard of guilt which is sought to be set up by the regulation. We do not agree.

When the regulation is read with 18 U. S. C. § 835, the statute under which it was promulgated and which makes its violation a criminal offense, it becomes clear that the offense is not merely malum prohibitum but that a specific wrongful intent, i. e., actual knowledge of the existence of a duty under the regulation and a wrongful intent to evade it, is of the essence of the offense. This the United States concedes. The vice which the district court saw in the regulation was that it placed the defendant on trial for an offense of which it had no adequate warning. The court relied in this connection upon the rule laid down in United States v. Cohen Grocery Co., 1921, 255 U. S. 81, and Connally v. General Const. Co., 1926, 269 U. S. 385. In another series of cases,[2] however, the Supreme Court has pointed out that where the punishment imposed is "only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects

[2] Omaechevarria v. Idaho, 1918, 246 U. S. 343, 348; Hygrade Provision Co. v. Sherman, 1925, 266 U. S. 497; United States v. Ragen, 1942, 314 U. S. 513; Screws v. United States, 1945, 325 U. S. 91, 102.

uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." Screws v. United States, 1945, 325 U. S. 91, 102. We think that this rule is applicable here. [fol. 34] The regulation makes it the duty of drivers of motor vehicles transporting the explosives or other dangerous articles referred to, "so far as practicable, and, where feasible, by prearranging their routes to avoid driving into or through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." To one who knows of his duty under the regulation the imposition of a duty to arrange to use that route which avoids congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings, so far as practicable and where feasible, is not to put him to a choice so uncertain as to violate the Constitution.

It is true, of course, that individuals may differ as to what is practicable and as to what is feasible and that marginal cases may arise in which a defendant's view as to the practicability and feasibility of an alternative route may differ from the view of the jury which tries him. But as Justice Holmes said in Nash v. United States, 1913, 229 U. S. 373, 377:

> "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

Moreover, we regard the standard here as reasonably certain. For we think that "so far as practicable" means so far as commercially practicable from the standpoint of those engaged in the trucking business,[3] and "where feasible" undoubtedly means where physically feasible from the standpoint of the operation of the motor vehicle involved.

The conclusion which we have reached finds full support in Sproles v. Binford, 1932, 286 U. S. 374, in which case the

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[3] See United States v. Wise, C. C. S. D. Ohio, 1881, 7 F. 190; The Benton, D. C. E. D. Mo. 1892, 51 F. 302.

[fol. 35] Supreme Court upheld a Texas statute, also dealing with safety regulations for motor vehicle transportation, which set up a standard of practicability somewhat analogous to that involved in the present regulation. In discussing in that case the contention that this provision was so uncertain as to afford no standard of conduct which it was possible to know, Chief Justice Hughes said, (p. 393:)

> "'Shortest practicable route' is not an expression too vague to be understood. The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U. S. 86, 109; *Nash v. United States*, 229 U. S. 373, 377; *Miller v. Strahl*, 239 U. S. 426, 434; *Omaechevarria v. Idaho*, 246 U. S. 343, 348; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502; *Bandini Co. v. Superior Court*, 284 U. S. 8, 18. The use of common experience as a glossary is necessary to meet the practical demands of legislation."

The defendant urges that the use of the terms "congested thoroughfares," "places where crowds are assembled" and "dangerous crossings" are also so indefinite as to invalidate the regulation. We do not think so. It must be remembered that these phrases are not to be considered or applied in vacuo. They only come into play in connection with the consideration by those responsible for the operation of a motor vehicle of the alternative routes which are open to them. Under these circumstances an individual will ordinarily have little difficulty in determining which of two or more practicable and feasible routes involves the fewest congested th-roughfares, places where crowds are assembled, street car tracks, tunnels, viaducts and dangerous crossings. In most cases the choice will not be close. But if it is, the defendant must take the risk that his judgment will not coincide with that of a jury with respect to what is basically a factual determination.

[fol. 36] Finally the defendant asserts that the counts in question are vague, indefinite and ambiguous and do not fully inform it as to the nature and extent of the crime with which it is charged because in addition to charging a violation of § 197.1(b) of the regulation they also allege that the

motor vehicle in question did not bear any marks or signs on its sides and rear indicating that it was transporting a dangerous and inflammable liquid. The district court held that the counts are so ambiguous as to be dismissible on that ground.[4] It is true that this particular allegation does not involve a violation of § 197.1(b) [5] but we think that its inclusion in the counts is mere surplusage which does not create any ambiguity or prejudice the defendant. It may, therefore, be disregarded.[6]

So much of the order of the district court as dismissed counts 1, 3 and 5 will be reversed and the cause will be remanded with directions to reinstate those counts of the indictment.

A true Copy:
Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

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[4] This was a ground of decision independent of the construction of the statute and regulation. It accordingly supports the jurisdiction of this court on this appeal under 18 U. S. C. § 3731. U. S. v. Wayne Pump Co., 1942, 317 U. S. 200.

[5] The allegations apparently involve a violation of § 823 (a) of 49 CFR, 1947 Supp., p. 7025.

[6] Ford v. United States, 1927, 273 U. S. 593; Bowdry v. United States, 8 Cir. 1928, 26 F. 2d 791, 793; McKinney v. United States, 9 Cir. 1949, 172 F. 2d. 781, 782.

[fol. 37] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,368

UNITED STATES OF AMERICA, Appellant,

vs.

BOYCE MOTOR LINES, INC.

On Appeal from the United States District Court for the District of New Jersey.

Present: Maris, McLaughlin and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that so much of the order of the said District Court in this case as dismissed counts 1, 3 and 5 be and the same is hereby reversed and the cause remanded with directions to reinstate those counts of the indictment.

Attest.

Ida O. Creskoff, Clerk.

May 3, 1951.

(Received & Filed May 3, 1951. Ida O. Creskoff, Clerk.)

[fol. 38] UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable, the Judges of the United States District Court for the District of New Jersey, Greeting:

Whereas, lately in the United States District Court for the District of New Jersey, before you or some of you, in a cause between United States of America, Plaintiff (Appellant), and Boyce Motor Lines, Inc., Defendant (Appellee)—Crim. No. 330-49—an order was entered in the District Court on

November 21, 1950, which order is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideraiton whereof, it is now here ordered and adjudged by this Court that so much of the order of the said District Court in this case as dismissed counts 1, 3 and 5 be and the same is hereby reversed and the cause remanded with directions to reinstate those counts of the indictment.

May 3, 1951.

[fol. 39] You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 21st day of May in the year of our Lord one thousand nine hundred and fifty-one.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

[Endorsement:] Crim. No. 330-49. No. 10,368. United States of America, Appellant, vs. Boyce Motor Lines, Inc. Copy. Mandate. Received & Filed May 21, 1951. Ida O. Creskoff, Clerk.

[fol. 40] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, and proceedings in this court in the case of United States of America, Appellant, vs. Boyce Motor Lines, Inc., No. 10,368, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 4th day of June in the year of our Lord one thousand

nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-fifth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

[fol. 41] [Stamp:] Received May 25, 1951. Office of the Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. —

BOYCE MOTOR LINES, INC., Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 2, 1951.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of May, 1951.

[fol. 34] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 167

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 15, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8001)